APPENDIX A.

CHAPTER 10. ALCOHOLIC BEVERAGES FAIR TRADE CONTRACTS AND PRICE POSTING

§ 24749. Policy.

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24759. Policy. It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.

24750. Contracts lawful. No contract relating to the sale or resale of any alcoholic beverage which bears,

or the label or container of which bears, the trademark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others violates any law of this State by reason of either of the following provisions which may be contained in such contract:

(a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor.

(b) That the producer or vendee of the alcoholic beverage require, upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee.

24750.5. Wine fair trade contracts. Fair trade contracts for wine have been and shall continue to be authorized by this chapter. Such contracts shall be governed by the applicable provisions of this chapter and Chapter 11 (commencing with Section 24850).

24751. Closeouts. The provisions authorized by Section 24750 in any contract imply conditions that the alcoholic beverage may be resold without reference to the agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage. At the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice shall be given of the character of the sale as a closeout sale. The alcoholic beverage shall first be offered to the manufacturer or vendor thereof at the original invoice price at least 10 days before it is offered for sale to the public.

(b) When the alcoholic beverage or container is damaged or deteriorated in quality, and notice of this fact is given to the public at the place of any such sale and upon the goods sold and in any advertisement in connection therewith.

(c) By any officer acting under the orders of any court.

24752. Selling below fair trade price. Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter or in any effective minimum retail price scheduled filed with the department pursuant to Section 24755, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.

24753. Contracts between producers. This chapter does not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

24754. Containers. The provisions of this chapter apply to the containers, cartons, cases, or bottles for alcoholic beverages.

24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amend-

ments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss Leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in

the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirts or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so

filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

24755.1 Penalties. No criminal penalties shall be imposed on any licensee for a violation of the provisions of Section 24755 nor shall the license of a licensee by suspended or revoked for a violation of such section.

The penalties imposed by the department for violations of such section shall be confined solely to monetary penalties for each violation committed during 36 consecutive months and shall be in the following amounts:

For the first violation, two hundred fifty dollars ($250); for the second and subsequent violations, one thousand dollars ($1,000). The penalties herein provided shall be due and payable by the licensee to the General Fund not later than 30 days from the date the department rendered its decision imposing the penalty. Should the licensee appeal the decision of the department, he shall either pay the amount of the penalty under protest or execute a surety bond in the amount of the penalty. The surety bond shall be executed by the licensee as principal and a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure in this state as surety, payable to the General Fund at such time as the final decision is rendered affirming the department's decision. If the final decision should reverse the decision of the department, the penalty paid by the licensee under protest shall be returned to him with interest at the rate of 6 per cent per annum or the surety bond executed by the licensee terminated.

The license of a licensee against whom the departent has imposed the monetary penalty and who has refused to pay the penalty for each violation under protest or execute a surety bond as herein provided shall be automatically suspended and shall remain suspended until such time as the licensee either pays the penalty under protest or executes the surety bond as herein provided.

Each sale in violation of section 24755 shall constitute a separate violation.

24756. *Distilled spirits price posting.* Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

24757. *Rule.* The department may adopt such rules as it determines to be necessary for the administration of Sections 24754 to 24756, inclusive, and shall take such steps as may be necessary to enforce the provisons of such sections and the rules adopted by it for the administration thereof.

APPENDIX B.

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined. The word 'brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesale or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by

a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower lefthand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minumum retail case prices covering all

case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) Change in Price of an Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being cha ged, and proportionately for smaller sizes. The same ype of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price

change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed

with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation. When for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of

acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution, Issuing agency; Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752; Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

APPENDIX C.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California Second Appellate District, Division Two.

James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Leverette D. House, Leon M. Cooper, Roger P. Garety, as Chairman and Members of the Alcoholic Beverage Control Appeals Board, Defendants and Respondents. 2nd Civil No. 31240.

Filed May 10, 1968.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph H. Nutter, Judge. Reversed, with directions.

Thomas C. Lynch, Attorney General, and Lynn Henry Johnson, Deputy Attorney General, for Appellant.

Leslie & Rubin and Lawrence Teplin for Real Party in Interest, Pennwick Corporation.

Leo K. Gallant, Senior Counsel, Alcoholic Beverage Control Appeals Board, for Respondent Alcoholic Beverage Control Appeals Board.

The instant appeal arises in the same manner and involves the identical issues recently decided in *Reimel v. Alcoholic Bev. etc. Appeals Bd.*, 256 A.C.A. 188 (hearing denied January 17, 1968).

Here, as in the case above cited, the trial court denied the petition for writ of mandate sought by the appellant, Department of Alcoholic Beverage Control, and thereby upheld the action of the respondent, Alcoholic Beverage Control Appeals Board, in reversing the de-

cision of the Department wherein a penalty had been imposed upon respondent and real party in interest, Pennwick Corporation, for selling certain alcoholic beverages at prices less than the established fair trade price in violation of Business and Professions Code, section 24755, and Title 4, California Administrative Code, section 99(a). The trial court spelled out the basis for its decision in the following conclusion of law:

"The decision of respondent [Alcoholic Beverage Control Appeals Board] that the record must contain substantial evidence of publication of the price schedules in compliance with the provisions of section 24755 of the Business and Professions Code constitutes a correct interpretation of that code section. Publication of the price schedules in a trade journal circulated among some but not all licensees in the trading area is not such compliance, and the department's rule 99(k) (title 4, California Administrative Code, section 99, subparagraph (k)) is invalid and in conflict with the publication provisions of Business and Professions Code section 24755, subparagraph (b)." Subparagraph (b) of section 24755, insofar as here pertinent, reads as follows:

"Any person filing such [minimum retail price] schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." The Department's rule 99(k) interpreting the above quoted language provides:

"(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or

new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof."

The minimum prices for the alcoholic beverages in issue in the instant proceeding had been published in the August 1964 edition of Patterson's Gazetter. Patterson's Gazetteer is a trade publication directed to the alcoholic beverage industry. It is published monthly and includes the prices of alcoholic beverages at wholesale and retail. It is published in the eight counties that compose the "trading area of Southern California" (Bus. & Prof. Code, § 24755(b)), and there are no similar publications published in these counties. Its subscribers are liquor licensees, wholesalers and brand owners and it has a circulation of approximately 10,500 subscribers. Although not necessary to the narrow question here presented, appellant introduced evidence that Pennwick was mailed the issues of Patterson's Gazetteer for June, July, August and September, 1964.

As previously indicated, the court in *Reimel v. Alcoholic Bev. etc. Appeals Bd., supra,* 256 A.C.A. 188, 195-201, rejected the contention of the respondent Appeals Board that section 24755(b) required that publication occur in such a manner that each retailer *will necessarily* be advised of the contents of the applicable minimum price schedule. It held that the Department had correctly interpreted section 24755(b) in its rule 99(k) and that the publication required need only be in a manner *most likely* to give notice to the affected licensees. A trade journal in general circulation in the trading area was held to be a proper vehicle for such publication. We concur in this determination. The

most recent decision in *Reimel v. House,* 259 A.C.A. 532, is in accord.

Although not the basis of the decision here under review, respondent Pennwick urges that section 24755 is unconstitutional and that section 24755.1 relating to penalties and added by the Legislature in 1965 is retroactive in application. Each of these contentions was expressly rejected in *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control,* 65 Cal.2d 349, 355 et seq. and 369 et seq., and in *Reimel v. Alcoholic Bev. etc. Appeals Bd., supra,* 256 A.C.A. 188, 201-204 and 205-206.

Respondent Pennwick in its brief has urged several additional points which were not raised before the Department, the Appeals Board or the superior court. "[T]hese points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. [Citations.]" (*Reimel, supra,* p. 205.)

The judgment is reversed. The superior court is directed to grant a writ of mandate commanding the respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

Herndon, *J.*

We concur:

Roth, *P. J.*

Fleming, *J.*

THE COURT: This opinion is not for publication pursuant to the provisions of Rule 976, California Rules of Court.